

SOULEN LIVESTOCK COMPANY ET AL.

IBLA 70-31 Decided April 23, 1971

Administrative Practice – Bureau of Land Management – Grazing Permits And Licenses: Appeals – Grazing Permits and Licenses: Apportionment of Federal Range

The Director of the Bureau of Land Management, upon review of the evidence relied on by a grazing district manager as justification for a proposed reallocation of grazing privileges among licensed users within the district, may properly determine that the reallocation should be held in abeyance pending further study, even though a licensee or permittee who appeals from the district manager's decision setting forth the terms of the proposed reallocation is unable to show that the reallocation is inconsistent with principles of sound range management or that it would create hardships constituting such a serious impairment to the licensee's livestock operation as to give him valid grounds for objecting to the proposal.

IBLA 70-31 : Idaho 1-66-2

SOULEN LIVESTOCK COMPANY

FRANK CADA ET AL.

Intervenors

:
:
: Dismissal of appeal from
: district manager's decision
: reversed
:
: Affirmed as modified
;

DECISION

Frank Cada, Rudolph Cada, Leslie West, Earl Craig, Milton Branch and Weldon Branch 1/ have appealed to the Secretary of the Interior from a decision dated January 31, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, reversed a decision of a hearing examiner dismissing the appeal of Soulen Livestock Company from a decision of the Boise, Idaho, district manager affecting its grazing privileges in the Boise grazing district (Idaho No. 1).

1/ Weldon Branch has not previously been identified as a party to these proceedings. Inasmuch as the addition of his name to the list of appellants will have no substantive effect, we do not find it necessary at this time to ascertain the basis for its inclusion or to determine whether or not Weldon Branch has any standing to appeal.

By a notice dated January 28, 1966, Soulen Livestock Company was advised by the district manager of his decision to shift its use of the federal range in the West Crane allotment of the Willow Creek unit to the Little Willow and Lower Crane allotments of the Crane Creek unit. This shift was proposed as the most acceptable of several alternatives for improving what was described as the unsatisfactory condition of the range in the West Crane allotment.

The district manager stated that the Little Willow and Lower Crane allotments are virtually individual allotments now that cattle use formerly made in common is being fenced into separate use areas and that ample "forage is available in these allotments to completely satisfy the recognized qualifications of the Soulen Livestock Company in the Crane Creek and Willow Creek units." He further found that:

... Although the recognized federal range qualifications of the Soulen Livestock Company in the West Crane Allotment was only 150 AUM's, as established by the District Manager's Decision dated April 14, 1961, the actual use licensed in this allotment as set out by the above Decision is 1000 sheep, 4/16 to 5/15 and 2000 sheep 11/15 to 12/15, or a total of 600 AUM's. The 150 AUM's recognized federal range privilege is derived by applying a 25% factor for federal range use.

Soulen Livestock Company does own 680 acres of land in this allotment which furnishes 114 AUM's of the above 600. Thus, the correct percentage would

be 81% and the actual use made of federal range is 486 AUM's rather than 150 AUM's. The way this comes about is as a result of past licensing practices for this Company. Since 1951, the license for the sheep operation has been written as 25% federal range over their entire area of use in Crane Creek and Willow Creek. As more specific use areas are defined and allotments fenced, it is necessary to correct this percentage for each such allotment to prevent serious inequities from developing. Thus when allotments are fenced to confine cattle use, where formerly they roamed at large over a larger area, it becomes necessary to define the amount of sheep use to be made in each allotment, keeping in mind the compensating factor or effect of restricting the cattle use from areas, formerly grazed in common with the sheep. . . .

The district manager also suggested that, in order to consolidate private land holdings into their respective grazing allotments, Rudolph Cada should trade his lands in the Lower Crane allotment for Soulen's lands in the West Crane allotment, any difference in value to be determined by a competent appraiser and paid in cash.

Soulen appealed from the district manager's decision, contending, in essence, that the proposed transfer of grazing privileges (1) was without due compensation, (2) would compound congestion in the Crane Creek unit and would further aggravate shortages of facilities for management development in the unit and would, in fact, cause a reduction in Soulen's grazing privileges, (3) would improve conditions in the West Crane Creek allotment at the expense of worsening conditions in the Crane Creek unit to

the same extent and (4) would reduce the stability of the Soulen Livestock Company, requiring it to alter grazing and trailing techniques, procedures and routines in a manner contrary to good animal husbandry practices and contrary to good range management practices. Pursuant to that appeal a hearing was held at Boise, Idaho, on July 13, 1967, at which appellants, represented by counsel, participated as intervenors.

In a decision dated July 30, 1968, the hearing examiner found that the issue raised by the appeal, and agreed to by the parties at the hearing, was whether the district manager was arbitrary and capricious in changing Soulen's licensed sheep use from the West Crane allotment to the Lower Crane and Little Willow allotments. From the testimony given at the hearing he found that Soulen owns about 10,000 sheep, that it has been its practice to begin the grazing of the sheep in the spring in the Lower Crane allotment, allowing them to trail down through the Little Willow allotment, going through the West Crane allotment and on to National Forest lands, and, in the fall, to reverse that pattern. The loss of 150 animal-unit months (AUM's), the hearing examiner found from the testimony of witnesses for Soulen, would not seriously endanger the continuance of the sheep operation, but would have an effect on the amount of profit.

Pointing out that the burden was upon Soulen Livestock Company to show by substantial and competent evidence wherein its rights were impaired and that an applicant has no right to demand that a license or permit confer grazing privileges in any particular part of a grazing district, the hearing examiner found that Soulen had over 30,000 acres of privately-owned land in the Little Willow and Lower Crane allotments, interspersed with 17,348 acres of open and 220 acres of fenced federal range land in the Little Willow allotment and 10,636 acres of open and 570 acres of fenced federal range in the Lower Crane allotment – a total of 58,774 acres, in which to graze its 10,000 sheep. The area of grazing assigned to Soulen under the district manager's decision, he stated, is larger than the area in which it was formerly authorized to graze and, with proper range management, should not cause any congestion in its sheep grazing operation. The hearing examiner further found that the Government had presented testimony that there is sufficient forage available for Soulen's sheep in the Little Willow and Lower Crane allotments, which was not refuted by Soulen, and that the West Crane allotment was overobligated, the recognized demand having been 1,897 AUM's as against 1,160 AUM's of available forage. It was, in his opinion, clear from the evidence produced at the hearing that the transfer of grazing privileges was in the interest of good range management. He concluded, therefore, that Soulen Livestock Company had failed to sustain its burden of proving that the district manager's

decision was arbitrary and capricious, and he granted a motion of the intervenors to dismiss the appeal.

The Office of Appeals and Hearings, upon consideration of Soulen's appeal from the decision of the hearing examiner, agreed with the hearing examiner that the burden was upon Soulen, as the one alleging that it had been wronged, to show wherein it had been wronged. It agreed with Soulen, however, that, although the proposed transfer of its privileges would not cause it such hardship as to endanger seriously its continuance in the livestock business, it would, to a considerable extent, disrupt and impair its present sheep operations and would result in a substantial loss of income.

Observing that the hearing examiner had correctly stated that an applicant for grazing privileges has no right to demand a license or permit to graze in a particular part of a grazing district, the Office of Appeals and Hearings stated that the more important issue to be determined in this case is whether the proposed transfer will be in the interest of good range management, and it found the evidence bearing upon this question to be unsatisfactory. Although Soulen may have 58,774 acres of range in the two allotments, it stated, it cannot be determined from the present record what part of that acreage is actually available for grazing. The kind of information that is needed, the Office

of Appeals and Hearings said, can be developed only "by use of the accepted and approved methods and techniques generally employed by the Bureau in making range surveys, which methods were clearly not employed in surveying the allotments involved."

The Office of Appeals and Hearings further found that there was considerable confusion as to the extent of the grazing privileges that were to be transferred from the West Crane allotment. Noting the hearing examiner's finding that 150 AUM's of federal range use would be shifted from the West Crane to the Little Willow and Lower Crane allotments, that Soulen's authorized use of the West Crane allotment was 600 AUM's, and that, according to the district manager's findings, Soulen's private land within the allotment furnished only 114 AUM's, leaving 486 AUM's, or 81 percent of the total, to be supplied from federal range, it stated that the "percentage of federal range use is certainly susceptible to a more precise determination." If the brief filed by the Idaho State Director in reply to Soulen's appeal to the Director, Bureau of Land Management, is to serve as a guide, the Office of Appeals and Hearings found, Soulen has not generally utilized its fall privileges in the past, so that the only real benefit which will accrue to the West Crane allotment will be the elimination of the pressure of 1,000 sheep for one month in the spring, which, on the basis of 25 percent federal range use, amounts to only 50 AUM's and is scant relief.

The Office of Appeals and Hearings recognized the need for corrective action in the West Crane allotment. It concluded, however, that the proposed transfer of Soulen's grazing privileges from the West Crane to the Lower Crane and Little Willow allotments, or any other shifting of grazing use between the allotments, should be held in abeyance until such time as more reliable information can be obtained with respect to the actual amount of forage available for livestock on both the private and the federal lands involved, using approved methods for making range surveys. If, on the basis of the information developed, it said, it is determined that the proposed transfer must be consummated in the interest of good range management, the precise amount of grazing privileges which Soulen Livestock Company is entitled to have transferred from the West Crane allotment should be ascertained, and an effort should be made to induce Soulen and Rudolph Cada to work out an amicable agreement for the exchange of title to lands which they own in the respective allotments, or the Bureau should work out suitable exchange-of-use agreements with the two licensees. The Office of Appeals and Hearings therefore reversed the hearing examiner's dismissal of Soulen's appeal and remanded the case to the district manager for appropriate action.

In challenging the action of the Office of Appeals and Hearings, appellants assert that (1) Soulen Livestock Company

failed to sustain its burden of proving by a preponderance of the evidence that the decision of the district manager imposed a serious hardship on its livestock operation, (2) the Office of Appeals and Hearings erroneously imposed upon the district manager the burden of proving by a preponderance of the evidence that his decision was the product of good range management, and (3) it erred in defining and applying the "law of impairment."

The appeal is a two-pronged attack, aimed, for different reasons, at the Bureau's decision in the instant case, as well as at the language used in certain past departmental decisions. Appellants' criticism of the Department's decisions arises from language used in 1938 in the case of National Livestock Company and Zack Cox, I.G.D. 55, 60, to the effect that:

[T]he determination of the particular area in which the grazing is to be permitted is a matter committed solely to the discretion of the Department, and no permittee can, as a matter of right, be heard to complain if the lands upon which he is permitted to graze are different from those which he has used in the past. Such a complaint could only be entertained upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land and improvements of the operator adjacent to the grazing district and seriously endanger the possibility of his continuance in the livestock business" (emphasis added).

Appellants are troubled by the underscored language which, they say is patently erroneous. No decision, they assert, can possibly "render valueless" the operator's private land, and the burden of proof imposed by the language is impossible to meet. Appellants further allege that, while the Department has continued to pay lip service to the standard set forth in the National Livestock Company case, in practice, it has not employed that test.

Appellants have reviewed at some length the development of the law governing the allocation of areas of grazing use. The questionable language of the National Livestock Company case, they argue, was not essential to the disposition of that case and is dictum. Moreover, they point out that a change in the Federal Range Code adopted soon after that decision established the right of permittees to graze the areas of their historical use, "[s]o far as consistent with proper range practices" (43 CFR 4115.2-1(e)(4)). Notwithstanding this provision, they further allege, the Department continued to assert that the allocation of areas of use was committed to its discretion, and that doctrine has been accepted too many years to be changed now. The standard which has actually been applied, appellants contend, postulates that allocations of area of use will be sustained unless an appellant shows that the area awarded him would create such hardships as to constitute a serious impairment to his livestock operation, citing, inter alia, Thomas Ormachea and Michael P. Casey, 73 I.D. 339, 348 (1966).

Appellants point to the fact that in a recent decision Gordon and Ekanger et al., Idaho 1-68-7, 8, 10 and 12 (March 11, 1969), 2/ a hearing examiner dismissed an appeal from a district manager's allocation of grazing privileges upon the basis of the National Livestock language, notwithstanding his finding that under the district manager's allocation, the appellants failed to receive an equitable portion of the available forage and that the allocation would impose a serious hardship on the appellants' operation. "In what appeared to be [one of] the most obvious cases on record," appellants argue, "the hearing examiner dismissed the appeal," while in the instant case, where the district manager's "decision did not impair the appellants' livestock operation within any meaning attributed to the term by any area of use decision," the Office of Appeals and Hearings reversed the hearing examiner's dismissal of the appeal.

Appellants contend that the Bureau has given no heed to Soulen's failure to make the showing of hardship customarily required to set aside an allocation of grazing privileges but, rather, has based its action upon what it deemed to be the

2/ Aff'd in part, dismissed in part on other grounds by the Bureau of Land Management, Gordon and Ekanger, Idaho 1-68-7, September 22, 1969; now pending on appeal Joyce Livestock Co., IBLA 70-96.

interest of good range management, ostensibly placing the burden upon the appellant to show that the proposed transfer of grazing privileges is not good range management but, in fact, requiring the district manager to prove that it is. If "it is now to be the law that an area of use may not be changed unless the District Manager sustains the burden of proving that it is good range management to do so," appellants conclude, "then it should be for the department to finally lay all aspects of National Livestock Company at permanent rest."

We do not find it necessary at this time to attempt a reconciliation of the language of the National Livestock Company case, supra, and the Department's language and actions in other cases or to determine whether, under the proper criteria, Soulen made such a showing as to entitle it to prevail in this matter. Before attempting to come to grips with the question of what is the applicable law in this case, it would seem well to review the major points of the decisions involved in an effort to set the actions of the hearing examiner and the Office of Appeals and Hearings in better perspective.

As we have seen, the hearing examiner determined from the evidence that Soulen Livestock Company failed to sustain its burden of showing that the district manager's decision was

arbitrary and capricious; he concluded that the proposed transfer of grazing privileges was clearly in the interest of good range management. Although the Office of Appeals and Hearings found that the proposed transfer would "disrupt and impair to a considerable extent" Soulen's present livestock business, it did not find that this fact would warrant rejection of the proposed transfer, and it did not dispute the hearing examiner's finding that Soulen had failed to show that the district manager's decision was arbitrary and capricious. It did not, in fact, recognize any right on the part of Soulen to continue to graze in the same areas in which its grazing privileges have been exercised in the past. The Office of Appeals and Hearings did, however, take exception to the hearing examiner's conclusion that "it is clear from the evidence produced that the transfer of grazing privileges in this case is in the interest of good range management," expressly finding that the proposed transfer "would not be good range management" or that, at the least, "the benefit to the federal range in the subject allotments that will be derived from the proposed transfer of grazing privileges is obscure to us at the present time." It did not, in reaching that conclusion, find that Soulen had shown by its evidence that the transfer would be contrary to principles of sound range management. Rather, it independently raised certain questions relating to the effect of the proposed shift of use and, finding no satisfactory answers to those questions in the evidence submitted by either

party, directed that additional information be developed before any transfer of grazing privileges should be put into effect. In other words, the Director of the Bureau of Land Management, acting through the Office of Appeals and Hearings, substituted his judgment for that of a subordinate as to what steps should immediately be taken to remedy the problem of overgrazing in the West Crane allotment.

The question before us at this time is not what showing a grazing licensee or permittee is required to make in order to cause a range manager's allocation of grazing privileges to be overturned. Rather, it is whether, in the absence of the required showing, the Director of the Bureau of Land Management may nevertheless substitute his own judgment for that of a subordinate to whom he has delegated responsibility for the exercise of discretionary authority vested in the agency. The answer to this, we believe, clearly must be in the affirmative.

It is almost axiomatic that the Director of the Bureau of Land Management or, in an appropriate case, the Secretary of the Interior, has authority at any time, with or without an appeal, to take up and dispose of any matter pending in a district office or to review any decision of a subordinate officer. See, e.g., Public Service Company of New Mexico, 71 I.D. 427 (1964);

Barney R. Colson, 70 I.D. 409 (1963), aff'd Colson v. Hickel, 428 F. 2d 1046 (5th Cir. 1970); Oscar C. Collins, Standard Oil Company of California, 70 I.D. 359 (1963); Angela Matthews Boos, A-28712 (September 21, 1962). The authority of the Director, or the Secretary, in acting upon an appeal extends to the making of all findings of fact and conclusions of law just as though he were making the decision in the first instance. United States v. T. C. Middleswart et al., 67 I.D. 232 (1960), and authorities cited.

The action of the Office of Appeals and Hearings in this instance clearly was within the scope of the authority of the Director. Although the Secretary has similar authority of review and could, in appropriate circumstances, substitute his judgment for that of the Director, such action is not warranted here. As matters now stand, no substantive rights of any range user have been affected. The problem of overgrazing in the West Crane allotment, readily acknowledged by all parties to exist, remains unresolved. Whether or not the transfer proposed by the district manager represents sound range management, we cannot say that the Office of Appeals and Hearings erred in calling for the development of additional information before the taking of remedial action which could affect the livestock operations of the licensed users of the allotment. Accordingly, its judgment will be sustained.

One additional point merits comment. As we have seen, the Office of Appeals and Hearings found that the kind of information essential to a proper resolution of the problems presented here could be developed only by the use of standard range survey methods, and it directed that a survey be made, using such methods, prior to any shifting of grazing privileges. The Department has, in the past, held that such a survey was not necessarily a prerequisite to action of the type contemplated here, and it stated in King Brothers, Inc., et al., I.G.D. 114, 118 (1938), that:

It is recognized that there is much necessary information to be obtained before the licenses in any given grazing district can be adjudicated in a wholly satisfactory manner. . . . But this does not mean that the acting regional grazer shall be powerless to take any action in regard to the areas in which licensees shall graze their livestock until all of the desired information has been obtained. On the contrary, it is necessary that he act in as reasonable a manner as possible and with due regard for the information he has at his disposal, and if he does so, his actions cannot be attacked, especially in the absence of an allegation that the information which is available to him and on the basis of which he has acted is erroneous.

The instructions of the Office of Appeals and Hearings are not necessarily inconsistent with the pronouncement of the Department in the King Brothers case. The fact that, in a given instance, a range adjudication might be sustained, even in the absence of some desired information, does not suggest that it would be improper to develop that information before making the adjudication. The instructions given by the Bureau in this case were

within the bounds of propriety regardless of whether the district manager's decision could have been sustained upon the evidence of record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Martin Ritvo, Member

We concur.

Francis E. Mayhue, Member

Anne Poindexter Lewis, Member.

